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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

J. WYATT SKAINES, d/b/a
WYATT TIRE DISTRIBUTORS,

Cross-Petitioner,

v.

UNIROYAL, INC.,

Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the Seventh Amendment Constitutional right to a jury trial has been violated when the District Court approved jury award of damages for loss of future profits in an antitrust case has been re-examined and remitted by the reviewing Court of Appeals.

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORDERS BELOW AND JURISDICTION

Cross-Petitioner, J. Wyatt Skaines, seeks review of that portion of the Order of the United States Court of Appeals for the Sixth Circuit filed on December 1, 1981, and Amended Order filed on January 22, 1982, which modified by remittitur a jury's special verdict for loss of future profits from an award of $205,000 to $30,000.00.

Cross-Petitions for rehearing were denied (with some modification of the original order) by the Court of Appeals on January 22, 1982. Neither order has been officially reported; the amended order on rehearing is appended to this cross-petition.

The cross-petition is filed pursuant to Rule 19.5 of this Court's Rules. Uniroyal filed a Petition for Writ of Certiorari on April 21, 1982, and it was received by cross-petitioner's counsel on April 21, 1982. This cross-petition is being filed not more than 30 days thereafter. The Court's jurisdiction to review is sought pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Seventh Amendment to the United States Constitution, U.S. CONST. Amend. VII, provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Section 4 of the Clayton Act, 15 U.S.C. §15, in part, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. Nature of the Case and Disposition by the United States Court of Appeals for the Sixth Circuit

Cross-Petitioner, J. Wyatt Skaines, the Plaintiff below in an action for treble damages for violation of the Robinson-Patman Act, 15 U.S.C. §13(a), was awarded a jury verdict and judgment was entered in the United States District Court for the Western District of Tennessee. Skaines, a franchised distributor for Uniroyal, alleged that Uniroyal, Inc. engaged in unlawful practices by discriminating in pricing and payment of consulting fees to a favored competitor, which destroyed competition and his business. The jury returned special verdicts awarding $223,319.00. Pursuant to 15 U.S.C. §15, the District Court trebled the verdict to $669,957.00 and awarded attorney fees to Skaines in the amount of $106,250.00 as part of the costs. Appendix 2, A-7 — A-9.

The United States Court of Appeals for the Sixth Circuit affirmed the jury's verdict as approved by the District Court; however, the Appellate Court remitted the jury's award for loss of future profits from $205,000 to $30,000. This cross-petition seeks to reinstate the jury's special verdict awarding damages for loss of future profits.

B. The Principal Parties

J. Wyatt Skaines resided in Memphis, Tennessee. He worked for Uniroyal for nine years. He was employed by Uniroyal as: a management trainee; a district credit manager for the Memphis territory; a business manager and supervisor for the New Orleans district; a territory sales representative; sales manager in New Orleans and Macon,

Georgia; and, an account manager for Uniroyal's Allied brands division in Texas and Arkansas.

He established and managed a Uniroyal tire dealership in Augusta, Georgia. He also established and managed a wholesale division for a tire dealer in Little Rock, Arkansas, which sold Uniroyal's Allied brand labeled tires. Skaines was engaged in selling or merchandising Uniroyal tire products, either for the company or dealers, for a total of thirteen years.

Uniroyal manufactured and sold tires through two divisions, the Uniroyal division and the Allied brands division. The Uniroyal division sold tires with Uniroyal, Tiger Paw, Laredo, Guardian and Guardian Premium labels. The Allied brands division sold tires with the Peerless, Fisk and Gillette labels. Skaines had been involved with credit and sales of all of Uniroyal's different labeled tires.

C. Memphis Trade Area

In 1968, Shelby Tire Company sold the Uniroyal labeled tires on a retail basis in Memphis. Later in 1968, Thomas Brewer opened Brewer Tire Company and he primarily sold the Uniroyal and Guardian labeled Uniroyal tires. Gillette labeled tires were being sold in Memphis by WECO Tire Distributors, which was owned by Uniroyal. No other Allied brand labels of Uniroyal tires were being sold in the Memphis trade area.

D. Partners for Profit Program

In 1968, Skaines discussed with C. V. Hinton, Uniroyal's regional sales manager for the Allied brands division, the possibility of going into the tire business with Uniroyal in Memphis, Tennessee. Skaines wanted the best priced tire

line that Uniroyal had available. He was advised that the Peerless labeled tires were the most competitively priced label Uniroyal had available.

On June 11, 1968, a projection was prepared by Uniroyal's regional sales manager for Allied brands, the territory sales representative and accounts manager for Allied brands, and the district credit manager for Uniroyal. Skaines projected his expenses, but the other elements of the projection, i.e., projected sales and gross profits, were developed by the Uniroyal representatives. The projection forecasted first year income for the business of $22,456.00. The draftsmen of the projection had combined management experience in excess of 50 years with Uniroyal tire dealerships and they agreed that the amounts forecast on the projection were reasonable.

On June 24, 1968, Skaines and Uniroyal entered into a Peerless Distributor Franchise Agreement. The agreement was part of the "Partners for Profit" program, wherein Uniroyal licensed Skaines as an independent wholesale dealer. Uniroyal had tested this marketing concept with their WECO tire distributors in several markets.

On June 24, 1968, a book balance plan was entered into between Uniroyal and Skaines, wherein Uniroyal extended Skaines credit in the amount of $20,000.00. Skaines pledged to Uniroyal,

> a security interest on all 'company brand tires' manufactured and/or sold by Uniroyal, Inc., including: UNIROYAL, FISK, GILLETTE, GUARDIAN PREMIUM, GUARDIAN PREMIUM NYLON AND PEERLESS OR ANY OTHER BRAND NAME OWNED OR USED BY UNIROYAL, INC. NOW OR IN THE FUTURE.

Skaines was not limited by Uniroyal as to the labels of Uniroyal tires he could buy and sell.

Under the book balance plan, Uniroyal invested in the business through inventory which was put in on deferred terms. The dealer's consideration was to maintain the inventory at the minimum book balance amount and an investment of $10,000 in the business. Uniroyal accepted Skaines for the program because of his excellent business management capacity and knowledge of the tire business, as well as the investment of his life savings.

Skaines' territory included Western Tennessee, Eastern Arkansas and Northwestern Mississippi. The tires Skaines purchased were manufactured by Uniroyal and sold to him in interstate commerce. He placed orders with Uniroyal at its regional office in Atlanta, Georgia.

E. Skaines' Performance and Growth

After starting business in July, 1968, Skaines realized sales from his first quarter of operation in excess of $25,000.00. Sales steadily increased for each of the next three quarters to an amount in excess of $40,000.00. In the third quarter of 1969, the favored competitor started business and Skaines' sales began to decline until he closed his business in March, 1970. Skaines realized a profit from the business within his first four months of operation; however, he encountered inadequate inventory problems with Uniroyal. By April 1969, he again realized profitability in the business for three successive months, but he again had inadequate inventory problems with Uniroyal. The manufacturer admitted it failed to provide Skaines with a proper book balance for inventory, which was finally increased to $30,000.00 in August, 1969.

Uniroyal's failure to provide tires to Skaines caused him to lose sales due to the unavailability of merchandise. In an attempt to meet customer demands, he purchased tires in excess of $30,000.00 from WECO and other Uniroyal dealers since the company would not provide him with an adequate inventory. The three months of largest purchases by Skaines from the Memphis WECO dealership were in August, October and November, 1969, which were three of the first four months of business of the favored competitor, United Tire & Rubber Company.

Respondent's business experienced net profits for six of the twenty months he was in operation, in spite of: Uniroyal's inadequate extension of credit for the first 12 months of business; Uniroyal's failure to furnish inventory; and, head-on competition with Uniroyal's illegally price-favored and commission-subsidized customer. In August and September, 1969, Skaines was able to realize profits, but the profits then were cut off with the entry into the Memphis market of Harold Friend's wholesale Uniroyal tire business, United Tire & Rubber Company ("United").

F. Harold Friend's Agreement With Uniroyal

Unknown to Uniroyal's district and regional management, to Skaines, to Brewer, and to the Memphis WECO management, early in 1969 Uniroyal's executive officers in New York were negotiating with Harold Friend to develop wholesale tire outlets in four cities in the United States. All of Friend's special billing prices were established and his orders placed with Uniroyal's executive officers in New York. In addition to the special pricing afforded to Friend, he was also paid $6,000.00 per month as a consultant for a nine and one-half month period of time, (August, 1969 through March, 1970).

Uniroyal's district and regional management officers admitted they had never known of any other Uniroyal dealer who received special prices and credit arrangements directly from the home office. Likewise, Brewer and Skaines were both unaware, during twenty years of combined employment and association with Uniroyal, of any other Uniroyal dealer who received such pricing or any consulting fees.

G. Uniroyal's Prior Knowledge of The Detrimental Effect of Friend's Operation on Competition With Other Uniroyal Dealers

Uniroyal's top management realized the detrimental impact Friend's "experimental wholesale program" would have on competition when Friend's program was discussed during a New York meeting, when one participant pointed out:

> . . . this type of outlet could interfere with our regular dealers in our retail stores, but Mr. Tully assured him that Friend's wholesale type of outlet would only be used where we had no distribution at the present time and that the prime purpose was to obtain entirely new distribution. (Pl. Ex. 15A5; R. 180, 859).

As of May 20, 1969, Friend planned to open his Uniroyal wholesale operation in El Paso, Texas; Shreveport, Louisiana; Lubbock, Texas; and, Memphis, Tennessee. On June 3, 1969, M. Harvey sent a telegram to Marvin Bruce, president of Uniroyal's replacement sales:

> Upon further review, it is our recommendation that we not move with Harold Friend in the El

> Paso market at this time in view of signing Jim Yearwood early this year. Present indications are that Yearwood should purchase $150,000.00 in the first twelve months. Suggest we hold off with Friend until end of this year and give Yearwood a chance to develop. If he does not work out, then we would suggest we move on Friend program at that time. If you agree, we will inform Yearwood accordingly. (Pl. Ex. 15M, R. 845, 857-858).

Friend opened his Memphis outlet in the name of "United Tire & Rubber Company", ("United"), in August, 1969. He owned and operated the business through his firm, Tire Management Consultants, Inc. of Phoenix, Arizona. Skaines had been in business for one year and he, as well as Uniroyal's regional and district managers, had no prior knowledge of United's entry into the market.

Skaines, WECO, and Friend's United operation were competing in the same consumer market in the Memphis trade area and each was operated in the same manner. Both Skaines and United were located within several city blocks of downtown Memphis.

H. The Like Grade and Quality of Uniroyal's Peerless, Uniroyal, Guardian and Guardian Premium Labeled Tires

Although Skaines was not limited by Uniroyal as to the kinds or labels of Uniroyal tires he could buy and sell, he purchased the Peerless label since it was supposed to be the best priced label. The Peerless labeled tires sold by Uniroyal to Skaines were of like grade and quality to the Uniroyal, Guardian and Guardian Premium labeled tires sold by Uniroyal to United.

Uniroyal's personnel and dealers understood that the tires were the same and that there was absolutely no consumer preference or name-recognition that resulted in any consumer preference between the respective labeled tires. Uniroyal stipulated that the consuming public is not provided any information to develop any preference based on any distinctions as to the grade and quality of the different labeled Uniroyal-manufactured tires. The expert testimony further confirmed that the engineering specifications, grade, quality and performance of the Peerless tires were "virtually identical" to the Uniroyal, Guardian and Guardian Premium labeled tires.

The jury refused to accept Uniroyal's theory that many of the tires sold to United were alleged "blems". Instead, the proof demonstrated that tire manufacturers oftentimes label tires as "blems" when they are merely factory overruns or have some minor cosmetic scuff or discoloration. Each Uniroyal district warehouse also has its own branding iron to place a "blem" imprint on tires sought to be discounted and sold. Insofar as performance, safety and consumer preference were concerned, the blems (sometimes known as Group IV tires), were the same tires as "first quality" tires (sometimes known as Group I tires). Both Skaines and Brewer were denied access to the alleged "blems" and United's records reflected that Group I tires were frequently substituted at "blem" prices.

I. The Anticompetitive Effect of Uniroyal's Price Discrimination Advantages to Friend

In mid-August of 1969, Skaines became aware of United's presence in the market by receiving United's mailers and price sheets from his customers. United's advertised selling prices were below Skaines' carload ship-

ment cost from Uniroyal. The price favortism enjoyed by Friend in comparison to the purchase prices Skaines received from Uniroyal ranged from ten to over fifty percent on each comparable tire of like grade and quality.

During twenty months of business Skaines purchased more than $155,000.00 worth of tires from Uniroyal. Had he received the sales prices Uniroyal gave to Friend, Skaines would have saved $37,761.38 in cost on tires of like grade and quality. By comparing the purchase invoices of Skaines and United during the period when these two businesses were in direct competition, i.e., July 25, 1969, through March, 1970, Skaines' average cost per tire was $6.46 more than United's cost for a tire of like grade, quality and size. Skaines purchased 3,461 comparable tires resulting in price overcharges for this seven month period of $22,293.46.

Uniroyal's price favortism to United and the resulting lower selling prices by United to consumers caused a tremendous drop in Skaines' business. Skaines, Brewer and local Uniroyal management had never seen tire prices as low as United was offering to tire buyers. More than 30 of Skaines' former customers began buying from United. The Plaintiff's lost profits on sales to these customers amounted to $3,476.07. Uniroyal's anticompetitive conduct resulted in Skaines losing his business and losing future profits and income in excess of $561,400.00 based upon Uniroyal's projection for his business. Brewer was also required to close his business.

J. Complaints to Uniroyal About the Price Discrimination Favoring Friend

Thomas M. Brewer, a former seven year employee of Uniroyal became a Uniroyal franchised dealer in Memphis

in the fall of 1968. Skaines had encouraged Brewer to obtain the Uniroyal franchise because he thought Uniroyal had more to offer Brewer than other competitors in the tire business.

Brewer testified that United was selling tires in the Memphis market cheaper than he could buy the tires from Uniroyal's district warehouse. After United flooded the market with brochures, handouts and advertisements, Brewer complained to Uniroyal's district manager and regional manager, that he, Skaines, WECO and others, (including Goodrich and Goodyear), were unable to compete with United's prices. Brewer requested that Uniroyal sell him tires at United's price, but he was advised that such purchase prices were unavailable.

Skaines also complained to Uniroyal's regional management about United's price advantage. Each manager denied any knowledge of United and merely encouraged Skaines to find customers that would pay higher prices for tires. Skaines requested the same buying arrangements, including the right to purchase the alleged "blem" tires that United was also advertising. The Uniroyal representatives denied the existence of any price-favored buying arrangement and also denied that any "blems" were available since Uniroyal had such good quality control. After finally admitting that the competitive problem existed, Uniroyal's district representatives complained to New York management about United flooding the Memphis market with so-called "blems". The complaints continued until February 28, 1970.

Friend was enjoying such favorable prices from Uniroyal that he began selling Uniroyal tires to Mohawk

dealers in Atlanta, Georgia, who were reselling the tires at substantially lower prices than Uniroyal dealers in Atlanta were paying for tires at Uniroyal's Atlanta regional warehouse. Friend's sales of tires outside of the Memphis metropolitan market was considered by Uniroyal as a violation of the agreement with Friend. After discovering Friend's "back-dooring" of the sale of tires in Atlanta, Uniroyal finally terminated its arrangement with Friend on March 25, 1970.

K. Skaines' Attempt to Compete and Uniroyal's Takeover of Skaines' Business and the Market

In an effort to meet United's competition, Skaines reduced prices and attempted to locate customers that did not know about United's prices. In the month of September, 1969, Skaines lowered his prices to meet United's competition. He experienced his largest volume in sales, but he was cutting his sales prices to cost, and he was still unable to meet United's competition. Skaines even tried to make purchases himself from United through Uniroyal distributors, since United's prices were cheaper than his cost from Uniroyal.

In an effort to save his business, Skaines made an informal proposal, to Uniroyal's regional manager, to merge his business with WECO. The proposal was communicated to Dave Harris, the vice-president of Uniroyal's Allied brands division. As late as March 4, 1970, Uniroyal's regional manager was requesting help from Harris to supply Skaines with the alleged "blems" or favorably-priced tires in order to meet United's competition in the market.

Although Skaines never missed a monthly payment to Uniroyal under the terms of the book balance agreement, Uniroyal demanded payment of the entire outstanding book balance of $26,000.00 to be paid on or before March 25, 1970. Because Skaines could not comply and keep his business operational, he assigned all of his accounts receivable and inventory to Uniroyal.

Uniroyal's Memphis WECO operation lost $16,900.00 during 1969 and it was operated at a loss for the entire three year period it had been in business. On April 6, 1970, WECO's manager requested authority from Uniroyal to pursue Skaines' customer accounts. WECO also hired Skaines' employee, who then sold WECO's Gillette labeled tires to Skaines' customers who had formerly purchased the Peerless labeled Uniroyal tires. After terminating Skaines, Brewer and Friend, and hiring Skaines' employee, Uniroyal's business performance at its WECO subsidiary improved. Uniroyal made adjustments, i.e., returns for defects, on Peerless labeled Uniroyal tires purchased by Skaines' customers, by substituting Gillette labeled Uniroyal tires at the Uniroyal Memphis district warehouse and at WECO.

Brewer was forced to close his Uniroyal dealership in June, 1970. In 1974, the United States Court of Appeals for the Sixth Circuit affirmed a District Court jury's finding that Uniroyal's price favoritism conduct to United was in violation of the Robinson-Patman Act and awarded damages to Brewer. *Brewer v. Uniroyal, Inc.*, 498 F.2d 973 (1974).

L. The Dealer's Damages

At trial, Skaines claimed damages as a result of Uniroyal's anticompetitive conduct in favor of United as follows:

a. Loss of profits on sales to customers diverted to United	$ 3,476.00
b. Price discrimination overcharges	22,293.46
c. Consulting fees paid to Friend	57,000.00
d. Loss of profits	336,400.00
TOTAL DAMAGES CLAIMED	$419,169.46

Skaines claimed damages for loss of future profits rather than claiming any damages for the going concern value of the business. At the request of Uniroyal, the jury returned special verdicts, all of which were approved by the District Court as follows:

a. Loss of profits on sales to customers diverted to United	$ 1,150.00
b. Price discrimination overcharges	16,969.00
c. Loss of future profits	205,200.00
TOTAL DAMAGES AWARDED	$223,319.00

The trial court properly instructed the jury that Skaines had the burden of proof to show a violation of the Act as well as proof of "actual damages" being sustained as the direct and proximate result of the alleged antitrust violation. *J. Truett Payne Company, Inc. v. Chrysler Motors Corporation,* —— U.S. ——, 101 S.Ct. 1923, 68 L.Ed. 2d 412 (1981). This standard of proof was previously the rule for the United States Court of Appeals for the Sixth Circuit. *Kidd v. Esso Standard Oil Co.*, 295 F.2d 497 (6th Cir. 1961).

The District Court trebled the jury verdict to $669,957 and the Court also awarded Skaines an attorney fee of $125,000, less a credit of $18,750 (15%) as the estimated amount of duplicated legal services required due to substitution of counsel, for a total fee of $106,250. The United States Court of Appeals for the Sixth Circuit approved the District Court award; but the Appellate Court remitted the special verdict for damages for loss of future profits from $205,200 to $30,000.

This cross-petition seeks a writ of review of the merits or summary disposition reinstating the District Court approved jury award of damages for loss of future profits pursuant to Rule 23 of this Court's Rules.

REASONS TO GRANT THE WRIT

I.

THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL CANNOT BE INFRINGED UPON BY A FEDERAL APPELLATE COURT RE-EXAMINING AND REMITTING A JURY VERDICT AWARDING LOSS OF FUTURE PROFITS WHEN THERE IS SUFFICIENT EVIDENCE UPON WHICH THE JURY HAD BASED ITS VERDICT.

The Seventh Amendment to the United States Constitution guarantees the right to a jury trial and prohibits the re-examination of facts tried by a jury by any court of the United States. U.S. CONST. Amend. VII. See also Fed. R. Civ. P. 38. This constitutional right extends to antitrust litigation. *Fleitman v. Welsbach St. Lighting Co.*, 240 U.S. 27, 29 (1916) and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1950). See also, *Ross v. Bernhard*, 396 U.S. 531, 532-538 (1970) and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 471-473 (1962). This right is not to be prejudiced even in complex litigation with complicated facts and difficulty of proof. *IBM v. Greyhound Computer*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1980) and *Gant v. Union Bank*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980). The practical application of this principle has been stated as,

> Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. *Duncan v. Duncan*, 377 F.2d 49, 54 (6th Cir. 1967), *cert. denied sub nom.* (Citations contained therein).

The United States Court of Appeals for the Sixth Circuit recognized in its opinion below that an individual may recover the loss of future profits if he can show that the defendant's alleged antitrust violation was the proximate cause of the damage to the business. Appendix 1, A-3 — A-5. However, the Court reasoned in part,

> In the case before us, we are of the opinion that the amount of the jury award is not sufficiently supported by the evidence.
>
> . . .
>
> Although we do not substitute our judgment for that of the jury, the paucity of the evidence to support such a large verdict is apparent. For these reasons, we remand to the District Court for entry of an order of remittitur. Appendix 1, A-5 — A-6.

Although the Court did not want to substitute its judgment for that of the jury, the remittitur constituted a complete reweighing of the evidence on the issue of loss of future profits. This action by the Court was completely contrary to its prior decisions which recognized that a jury's award of damages should not be remitted or set aside, where the amount of damages awarded by the jury is clearly within the "maximum limit of a reasonable range". *Brewer v. Uniroyal, Inc.*, 498 F.2d 973, 977-978 (6th Cir. 1974).

> Where the jury finds a particular quantum of damages and the trial judge refuses to disturb his finding on the motion for a new trial, the two factors press in the same direction, and an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial. *Manning v. Altec, Inc.*, 488 F.2d

127, 133 (6th Cir. 1973), dictum citing: *Taylor v. Washington Terminal Company*, 409 F.2d 145, 148 (C.D. Cir. 1969), *cert. denied*, 396 U.S. 835 (1969).

II.

THE JURY'S SPECIAL VERDICT AWARD FOR DAMAGES FOR LOSS OF FUTURE PROFITS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS WELL WITHIN THE MAXIMUM RANGE OF REASONABLENESS.

A. The antitrust violations by Uniroyal proximately destroyed competition and Skaines' business.

All damages and losses sustained by an injured party are recoverable under the damage penalty provision of the antitrust laws. 15 U.S.C. §15. *Perkins v. Standard Oil of California*, 395 U.S. 642 (1969); *Volasco Products Co. v. Lloyd A. Fry Roofing Products Co.*, 346 F.2d 661 (6th Cir. 1965), *cert. denied*, 382 U.S. 904 (1965).

Although sheer speculation is not allowed as a standard for assessing damages in an antitrust case, a plaintiff is not required to show mathematical precision. As a result of the antitrust violator's conduct, the amount of damages is not subject to a rigorous degree of proof. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, —— U.S. ——, 101 S.Ct. 1923, 1929, 68 L.Ed. 447 (1981); *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-124 (1960); and *Bigelow v. RKO Pictures*, 327 U.S. 251, 264 (1946).

In compliance with *Payne*, Skaines proved that he sustained actual damages as a direct and proximate result of Uniroyal's price favoritism to United. The Memphis tire

market had never experienced tire prices as low as United offered to customers. As a result, there was a tremendous decline in Skaines' business and more than 30 of his former customers began buying from United after it opened for business. On tires of like grade, quality and size, Skaines claimed that he lost profits from these sales in the amount of $3,476.07. The jury awarded $1,150.00 in damages for this economic loss.

During the period when both businesses were in direct competition with one another, (i.e., July, 1969, through March, 1970), Skaines claimed that he paid Uniroyal $22,293.46 more than United paid for tires of like grade, quality and size. The jury awarded Skaines $16,969.00 for this item of damage.

Skaines lowered his prices to a cost basis; yet, he was still unable to compete against the prices United offered to customers. Skaines lost profits and sales by attempting to meet United's competition. Skaines and Brewer were forced out of business within several months of United's entry into the market.

B. The manufacturer's projection of a dealer's future profits and the dealer's performance are competent evidence and relevant data for a jury's consideration in awarding damages for loss of future profits.

As a result of Uniroyal's illegal conduct, Skaines lost his business and hence, the anticipated future profits. Due to Uniroyal's violative conduct, Skaines' business was destroyed within seven months of United's entry into the Memphis tire market. Skaines, as Cross-Petitioner, claimed

damages for loss of future profits in lieu of claiming damages for the going concern value of the business.

Skaines' claim for damages for loss of future profits was based upon the projection prepared by Uniroyal's territorial sales representative, account manager and district credit manager. Skaines had prepared the projected expense figures and his actual expenses were less than the amounts he had forecast. Uniroyal's participants who prepared the projection and Skaines had more than fifty years combined experience with Uniroyal and Uniroyal tire dealerships. They all agreed that the amounts reflected on the projection were fair and reasonable.

The projection was relied upon as the basis for Skaines' selection of Uniroyal and his investment in the tire business. The annual income projected for the business was $22,456.00. The projection was prepared by Uniroyal's representative utilizing their experience in the business, and it reflected comparable experience of others in the tire business. The projection was relevant data for reference by the trier of fact.

The comparable experience of others in a field has been recognized as an acceptable reference for proof of damages in an antitrust case. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Lehrman v. Gulf Oil Corporation*, 500 F.2d 659 (5th Cir. 1974) (dictum); *Richfield Oil Corporation v. Karseal Corporation*, 271 F.2d 709 (9th Cir. 1959). A mathematical projection based on the prior business of a plaintiff is a reasonable method of calculation of damages even though it cannot be shown with mathematical precision. *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, supra.

If a projection is available and based on extensive experience of sales and profits, then it should be available as credible evidence. If the figures are good enough for reliance by a party to invest his money and his career, it would seem that such a projection should be a reasonable source of consideration for the trier of fact.

C. The Appellate Court's remittitur was based upon a misunderstanding of uncontroverted facts which reflected the Dealer's business performance as additional relevant data for the jury's consideration of loss of future profits.

The Sixth Circuit Court of Appeals erroneously summarized the Cross-Petitioner's evidence on the claim for loss of future profits as,

> The only data presented by Skaines in support of his claim for future profits is that contained in the Financial and Operating Budget for the year 1968-69 and his statement that he expected to stay in business until he retired 25 years later at the age of 65. The fact that Skaines contended that the business realized sales greater than $25,000 for the first year of business in the face of income tax returns that showed a net loss for the two fiscal years that he was in business does not help his position. Appendix 1, A-4 — A-6.

The Court of Appeals erroneously concluded that Skaines, ". . . contended that the business realized sales greater than $25,000 for the first year of business . . ." Appendix 1, A-5 — A-6. In fact, the sales for his first year of business were in excess of $127,500.00 (Pl. Ex. 128; R. 224). He commenced business in July, 1968, and he realized sales

in excess of $25,000 in the first quarter of business. Sales were in excess of $30,000 for the second quarter, $32,500 for the third quarter and $40,000 for the fourth quarter of his first year of operation.

Whenever Skaines was not hampered by Uniroyal's failure to provide inventory or adequate book balance, his business grew in its profitability and realized a normal profit growth. Such was the case until United entered the Memphis market. From Skaines' experience in credit, sales management and marketing with Uniroyal and its tire dealers, the profitability of his business had been unusual since profits had been so quickly realized. Skaines' quarterly sales increased steadily and corresponded with Skaines' experience with other successful new Uniroyal dealers. Uniroyal introduced no contradictory evidence. However, the dealership suddenly began to experience a reversal of its sales and growth trend in the third and fourth quarters of 1969 and the first quarter of 1970, when Skaines was finally required to close his doors.

Uniroyal projected $22,456 in annual income for the first year, which included a $9,000.00 owner withdrawal. The trial Court required the owner withdrawals to be deducted as representing annual salary or expected cost of management. Uniroyal admitted that due to Uniroyal's failure to provide Skaines with an adequate extension of credit and due to Uniroyal's failure to provide him with adequate inventory, Skaines did not enjoy the success in his first year of business that he should have enjoyed. Despite Uniroyal's failure to provide Skaines with an adequate extension of credit, their failure to furnish adequate inventory, and the unfair competition with United, Skaines generated net profits from the business

for six of the twenty months that he was in operation. These facts are contrary to the appellate court's order which states that the "evidence only showed that the Plaintiff lost money during the entire time of his venture." Appendix 1, A-4 — A-5.

When profits can be extrapolated from the prior experience of a business, they are recoverable even if prior experience reveals only net losses. *Westric Battery Co. v. Standard Elec. Co.*, 482 F.2d 1307 (10th Cir. 1973). An antitrust plaintiff may prove his damages by reasonable estimate and juries are allowed to act upon profitable and inferential evidence, as well as, direct and positive proof. *Bigelow v. RKO Radio Pictures, Inc., supra*, 262-266. As observed by this Court,

> The wrongdoer may not object to the Plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable. *Bigelow, supra* at 265.

Even if there is some uncertainty in the mode of estimating damages, if the uncertainty is caused by the defendant's own wrongful acts, then justice and sound public policy alike require that the wrongdoer bear the risk of the uncertainty thus produced. *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931). As observed by the District Court, part of Skaines' difficulty in proving his case was "due to Defendant's [Uniroyal's] inability to furnish adequate records." Appendix 3, A-15 — A-16.

D. The estimation of the duration of the expected profitability of a business is an issue of fact.

The Appellate Court was also apparently concerned with the fact that the jury would have to "speculate" on the length of time that the Cross-Petitioner would have had a thriving business. Appendix 1, A-4—A-5. No evidence was tendered to establish any prospective termination of the dealership arrangement with Skaines. Instead, the record is without contradiction that Skaines intended to continue in business for 25 years until he attained the age of 65.

The duration of the period in which a party might be expected to profit is not susceptible of precise formulation; rather it is a jury question and the youth of a business alone will never justify severe restrictions upon the duration of damages. *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972).

As the *Bigelow* rationale was considered by Mr. Justice Black,

> . . . when as here a young man's business is wiped out, root and branch, by a wrongdoer, the measurement of the victim's damages is not so simple a matter. This is true because no one can infallibly predict how long that business would have continued to grow and flourish or precisely how much the business would have been worth to him in 25 years. But certainly a fair and just legal system is not required by difficulties of proof to throw up its hands in despair and leave the sufferer's damage to be borne by him while the person who did the wrong goes scot free. This Court has refused under such circumstances to hold that our system

> of justice is so helpless to do justice. In this very antitrust field, our Court has specifically and pointedly refused to permit antitrust violators to escape liability for the wrongs on the argument that damages must not be awarded because they are uncertain and speculative. *Simpson v. Union Oil Co. of California*, 396 U.S. 13, 16 (1960) (Black, J., Concurring and Dissenting).

Skaines sought damages for loss of future profits in an amount of $336,400, which represented annual earnings from the business of $13,456 for 25 years until he attained the age of 65. Although Uniroyal's projection forecasted annual income for the first year of $22,456, owner withdrawals of $9,000 per year were not included in Respondent's calculation of his loss of future profits. The $336,400 amount claimed did not include any amount for growth and development. The jury awarded $205,200 for this item of damage, which represents approximately 11 years of the annual amount of anticipated earnings ($13,456) at a compound interest rate of six percent (6%). Since this case came to trial more than nine years from the date of the demise of Skaines' tire business, the award by the jury is well within the maximum range of reasonableness. *Brewer v. Uniroyal, Inc., supra* at 977-978. If there is some evidence of a reasonably anticipated profit, then the appellate court should not set aside or disturb such a verdict that has been sustained by the trial court. *Sinclair Refining Co. v. Gutowski*, 195 F.2d 637, 641 (6th Cir. 1952).

Uniroyal's projection, the growth of Skaines' business and his experience in the tire business provided the jury with reasonable data and evidence to properly consider and award damages for loss of future profits. The jury's verdict

for $205,200 for this item of damages was well within a range of reasonableness and it was a fact issue which should not have been re-examined by the Court of Appeals in violation of the parties' right to a jury trial as secured by the Seventh Amendment to the United States Constitution. U.S. CONST. Amend. VII.

CONCLUSION

For the reasons stated, the question presented merits review by this Court by grant of a writ or by summary disposition reinstating the total amount of the jury's special verdict for loss of future profits.

Respectfully submitted,

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